SUPREME COURT, U.S.
MOTION FILED MAR 31 1955

IN THE

Supreme Court of the United States

October Term 1954

No. 337

ALEXANDER NORWOOD, *Petitioner*

vs.

HONORABLE WILLIAM H. KIRKPATRICK, etc.

JOSEPH F. TUNSTALL, *Petitioner*

vs.

HONORABLE WILLIAM H. KIRKPATRICK, etc.

JOHN E. SMALLWOOD, *Petitioner*

vs.

HONORABLE WILLIAM H. KIRKPATRICK, etc.

PETITION FOR LEAVE TO FILE BRIEF AND BRIEF FOR AMICUS CURIAE OUT OF TIME

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To the Honorable the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petition of Dining Car Employees Union respectfully represents that:

1. Your petitioner is the duly constituted representative of the railroad dining car employees, whose membership is composed entirely of Negroes including therein the petitioners, Alexander Norwood, John E. Smallwood and Joseph F. Tunstall.

2. Every member of your present petitioner and your petitioner as a group have a vital interest in the outcome of the pending cases since many of its members are frequently exposed to the hazards of railroad accidents occurring in all Southern States.

3. Counsel for your petitioner read the briefs and arguments filed in this case prior to oral argument and believed then that the interests of its members as Negro railroad employees were adequately protected.

4. Petitioner is advised, believes, and, therefore, avers that at the oral argument in this case before your Honorable Court counsel for the plaintiffs therein stated that the fact that the three plaintiffs were Negroes was purely fortuitous and not a determinative factor for the consideration of this Court in deciding this appeal.

5. Your petitioner disagrees with said statement and on the contrary believes the fact of the race of the plaintiffs therein is of great importance in determining the proper decision herein for the reasons set forth in the brief attached hereto.

6. Because of the disagreement with the oral statement of counsel for the plaintiffs, your petitioner does not believe that the position of your petitioner and its Negro members has been adequately presented to this Court.

7. Petitioner avers that it was impossible for petitioner to reach the conclusion set forth in paragraph 6 hereof until after the conclusion of oral argument.

Wherefore, your petitioner asks leave to file a Brief Amicus Curiae out of time.

DINING CAR EMPLOYEES UNION

By EDMOND O. JOHNSON
Edmond O. Johnson, *President and General Chairman*

GEORGE B. PARKS
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BRIEF FOR AMICUS CURIAE OUT OF TIME

ARGUMENT

It has come to our attention that counsel for the petitioners, Alexander Norwood, John E. Smallwood and Joseph F. Tunstall, stated at the bar of your Honorable Court that the race of the petitioner's was incidental, fortuitous and not important in the decision of these cases. With this statement we disagree, although in disagreeing we nonetheless agree with the position of the plaintiffs that

this is not the proper forum for an attack upon an exercise of discretion. However, we believe that the facts of this case sharply emphasize and underline the reasons why the defined limitations of the doctrine of *forum non conveniens* should apply in the application of Section 1404(a). It may be speculated that the racial consideration was at least one of the factors which would have moved Judge Kirkpatrick to retain jurisdiction had he been bound by the limitations of *forum non conveniens.*

In both *Koster* v. *Lumbermens' Mut. Casualty Co.,* 330 U.S. 518 (1947) and *Gulf Oil Corporation* v. *Gilbert,* 330 U.S. 501 (1947), this Court laid great emphasis upon the fact that in those cases, where the Court was called upon to apply the doctrine of *forum non conveniens,* the plaintiffs could point to no sound reason for being in the forum selected. In other words, the plaintiffs there argued merely that it would not be a great inconvenience to the defendant without urging affirmative reasons for the convenience of or justice to those plaintiffs. It is fair inference that had there been such affirmative reasons the doctrine of *forum non conveniens* would not have been invoked in those cases. It is here that the question of race becomes of overweeing importance. Certainly, it is perfectly obvious that the plaintiffs, being as they are northern Negroes, had compelling reasons for selecting a northern forum. What we have said is not to be taken for an instant to be even the slightest breath of criticism of the Federal Judiciary, and we need not affirm our knowledge that a Federal Judge in South Carolina would do all within his power to insure a fair trial, as would any other Judge in any other part of the United States. However, human nature being what it is we have only to present the picture of three northern Negroes trying their cases before a white jury in South Carolina to realize,—not the convenience,—but the apparent necessity to these plaintiffs for the selection of a northern forum.

It is of great significance that regardless of the evidence produced by the defendant these cases must inevitably and

ultimately be decided by a jury, since the derailment of the train in whose operation the plaintiffs were not concerned establishes a *prima facie* case of negligence under the doctrine of *res ipsa loquitur*: *Jesionowski* v. *Boston & M. R.R.*, 329 U.S. 452 (1947).

It is not without significance that the transferee state in this case is that which is most outspoken, both through its legislature and its executive, in its opposition to the recent segregation opinion of this Court in *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954).

This Court has once and for all set at rest any contention that Section 1404 (a) does not apply to actions under the Federal Employers' Liability Act: *Ex Parte Collett*, 337 U.S. 55 (1949). But this Court has also said that the initial choice of venue under Section 6 of the Federal Employers' Liability Act still remains: *Boyd* v. *Grand Trunk Western R. Co.*, 338 U.S. 263, 266 (1949). And yet the Third Circuit's interpretation of Section 1404 (a) in *All States Freight* v. *Modarelli*, 196 F. 2d 1010 (C.A. 3, 1952) has diminished the choice almost, if not quite, to the vanishing point. Balance of the interests under the *Modarelli* rule will almost inevitably result in transfer to the *locus* of the accident. Hence colored plaintiffs injured in the South will inevitably have to try their cases before Southern juries.

A similar constriction of choice faces all railroaders, both negro and white, under the *Modarelli* interpretation. In many of the comparatively small cities in our country, the railroad is the dominating industry. In those cities such as Altoona, Pennsylvania, there is scarcely a family which in some way is not dependent upon the railroad for its livelihood. In such localities a plaintiff is faced with a very real problem in attempting to select a jury which will not be either in fear of or beholden to the railroad. Such employees would have real reason for selecting a forum removed from such influences and yet the mere balance of conveniences as suggested in the *Modarelli* opinion would force them back to the unreceptive atmosphere.

We point this out merely to emphasize the problem with which the Negro is faced in being forced to try his case before a Southern jury and also to point out why not only in these present cases but in all cases under Section 1404 (a) the limitation, weights and balances of the doctrine of *forum non conveniens* should be applied and not the loose balancing of *Modarelli*. A striking and distressing off-shoot of the *Modarelli* interpretation is evident here, where one of the plaintiffs actually lives and was medically treated in the district where suit was started. Yet he is being forced into a hostile district, far removed from his home and witnesses.

Again without attempting to relitigate or even to question the result in *Ex Parte Collett*, 337 U.S. 55 (1949), and recognizing fully that Section 1404 (a) applies to such actions as these, we point out that this type of case is an emphatic illustration of why the *criteria* of *forum non conveniens* should be adopted.

Congress has seen fit to grant affirmatively by positive legislation unrestricted choice of forum under Section 6 of the Federal Employers' Liability Act. Congress has also seen fit not to repeal the grant of that choice in spite of efforts to persuade it to do so: See *Pope* v. *Atlantic Coast Line R. Co.*, 345 U.S. 379 (1953). What we are saying is simply this: Of course, Section 1404 (a) applies to this class of case but in order to effectuate the manifest intent of Congress it must be applied, not with a mere balance of conveniences, but with great weight given to the plaintiffs, choice of forum. In short, we say that Section 1404 (a) should be applied within the delineations of the doctrine of *forum non conveniens* and that only such application will express the Congressional intent.

The cases presently before this Court and the interests of this Union are sharp reminders of the necessity for such a construction. If these and other Negro railroaders injured in the South are to be relegated to Southern juries for the trial of cases occurring in the South, the choice of Section 6 is a chimera. Such would not be the result in

these cases had Section 1404 (a) been interpreted as the equivalent of the doctrine of *forum non conveniens* and for this statement we need go no further than the opinion of Judge Kirkpatrick.

We do not seek a repeal of Section 1404 (a). We do not seek a removal of Federal Employers' Liability Act cases from Section 1404 (a). What we do seek for the members of this Union is an orderly continuation of Section 1404 (a) applicable alike to all actions but one which will be within defined bounds and which will give to the initial choice of forum the weight traditionally attached to it by the doctrine of *forum non conveniens*. Such an interpretation will result in uniform application of the section. It will place choice of forum in its proper perspective. It will not result in a mere balancing of conveniences. And in these cases before the Court, it will result in a retention rather than a relinquishment of jurisdiction.

More broadly, however, it will mean that the Negro members of this Union who actually live in the North, who are treated by Northern doctors, who cannot afford the financial burden of transporting those doctors to distant jurisdictions, who cannot face with confidence a Southern white jury, will be able to exercise the right given by Section 6 of the Federal Employers' Liability Act with the knowledge that that right has some practical value. Such a result can be reached only by applying what seems to be the plain intent of Congress that Section 1404 (a) is *forum non conveniens*. The outcome of these cases is of importance to these plaintiffs, but it is of transcending importance, multiplied many times, to this Union and its negro members.

This Court does not and must not permit itself to live in an ivory tower. The miscarriage of justice that ultimately resulted in the case of *Atlantic Coast Line R. Co. v. Davis*, 185 F. 2d 766 (C.A. 5, 1950) is a blot upon American Jurisprudence. The litigation involving this poor colored widow's rights under the Federal Employers' Liability Act concluded with a verdict for the railroad despite

the fact that her husband was killed by the sheerest and clearest type of negligence while in the employ of the railroad company. In that case her counsel in recognition of the racial prejudice problem had instituted suit in New York though the accident occurred near Jacksonville, Florida.

Under the holding of this Court in *Ex Parte Collett*, supra, the litigation was transferred back to Jacksonville. A great and able Judge, Dozier A. DeVane presided over the trial. Despite every effort exerted by him to achieve a fair result, two white juries were unable to agree upon a verdict. That fair minded Southern Judge, recognizing that the climate was inimical to a fair trial for that colored widow, ordered the case back to New York so that justice might prevail. Regardless of the legal accuracy of his exercise of this power which was reserved by the Court of Appeals for the Fifth Circuit, the principle involved is paramount. It is a recognition by an experienced trial Judge aware of this problem that despite every effort made by him to achieve even and fair justice, he was unable to control the jury.

How then can any one say that the color question is not of tremendous importance in these motions and in the consideration of the legal question here involved. This case is an outstanding example pointing up the reason for confining a Trial Judge's exercise of discretion in deciding questions under 1404 (a) to the limitation of "forum non conveniens". That case should never have been transferred out of New York in the first place nor should these cases be transferred to South Carolina today. It was consideration of factors of this nature that led Congress to grant special venue privileges to railroaders.

Respectfully submitted,

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